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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re T.A., a Person Coming Under the  
Juvenile Court Law.

B267651  
(Los Angeles County  
Super. Ct. No. MJ22980)

THE PEOPLE,

Plaintiff and Respondent,

v.

T.A.,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County, J.  
Christopher Smith, Judge. Affirmed as modified.

Stephane Quinn, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney  
General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Paul S.  
Thies, Deputy Attorneys General, for Plaintiff and Respondent.

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T.A., a minor, was found to have committed hit and run driving resulting in injury to another, hit and run driving resulting in *serious* injury to another, and driving without a license. The juvenile court declared her to be a ward of the court, placed her on home probation for a maximum period of confinement of four years and four months, and ordered her to pay the victim's "damages" as restitution. On appeal, T.A. contends: (1) The finding that she committed hit and run causing serious injury necessarily included the finding that she committed hit and run causing injury; (2) the restitution order was improper; and (3) the maximum period of confinement provision was improper. We agree with each contention. Accordingly, we will order that a finding be stricken and the judgment modified. In all other respects, we affirm.

### **Background**

On the night of October 21, 2014, T.A., age 15 and possessing no driver's license, drove her mother's boyfriend's truck to a store. As she was driving home she struck Rayvon Hawes, who was walking in the dark, unlit roadway. T.A. proceeded home without stopping, and upon arriving informed her mother about the accident. She and her mother then drove back to the scene, discovered Hawes lying in the street unconscious, and called 911. He had suffered extensive injuries.

T.A. was charged in a juvenile petition with hit and run driving resulting in injury to another person (Veh. Code, § 20001, subd. (a)), hit and run driving resulting in serious injury to another person (*id.* at subd. (b)(2)), and driving without a license (Veh. Code, § 12500, subd. (a)). At the hearing, the juvenile court found the accident occurred on a "dark road" where it was "hard to see," and stated it accepted "the fact that [Hawes] was walking in the roadway when he shouldn't have been in the roadway, and . . . [had tested positive] for opiates in his system, cannabis, and benzodiazepine." The court nevertheless sustained the petition, found T.A.'s hit and run offenses to be felonies, and declared her a ward of the court. (Welf. & Inst. Code, § 602, subd. (a).) The court placed her on home probation for a maximum period of confinement of four years and four months, ordered that she pay a restitution fine in the amount of \$100 plus a \$10 service charge, and ordered, over her objection, that she pay Hawes "for any damages," in an

amount to be determined by her probation officer and subject to court approval. The prosecutor estimated that Hawes's damages would exceed \$1 million.<sup>1</sup>

T.A. timely appealed.

## **DISCUSSION**

### **I. The finding that T.A. committed a lesser included offense must be stricken.**

T.A. contends the juvenile court erred in finding true that she committed both hit and run resulting in serious injury and hit and run resulting in injury, a lesser included offense. The Attorney General concedes the point, and we agree.

“When a defendant is found guilty of both a greater and a necessarily lesser included offense arising out of the same act or course of conduct, and the evidence supports the verdict on the greater offense, that conviction is controlling, and the conviction of the lesser offense must be reversed.” (*People v. Sanders* (2012) 55 Cal.4th 731, 736.) A lesser offense is necessarily included in a greater if the elements of the latter include all of the elements of the former, “such that the greater offense cannot be committed without also committing the lesser.” (*People v. Birks* (1998) 19 Cal.4th 108, 117.) The offense of hit and run resulting in serious injury cannot be committed without also committing hit and run resulting in injury. Therefore, the true finding as to the lesser offense must be reversed.

### **II. The restitution order was improper.**

T.A. contends the order of restitution was tantamount to an assignment of civil liability in violation of her due process rights. We agree.

“[A]ll persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.” (Cal. Const., art. I, § 28, subd. (b)(13)(A).) Accordingly, a minor who has been declared a ward of the court for conduct that injured another shall be ordered to pay restitution to the victim “in the amount of the losses, as determined. If the amount of loss

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<sup>1</sup> There is no indication in the record that T.A.'s probation officer has determined the amount of Hawes's damages.

cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court at any time during the term of the commitment or probation. The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record. A minor's inability to pay shall not be considered a compelling or extraordinary reason not to impose a restitution order, nor shall inability to pay be a consideration in determining the amount of the restitution order. A restitution order . . . shall be of a dollar amount sufficient to fully reimburse the victim or victims for all determined economic losses incurred *as the result of the minor's conduct for which the minor was found to be a person described in Section 602*, including" payment for the value of damaged property, medical expenses, and lost wages. (Welf. & Inst. Code, § 730.6, subd. (h), italics added; see Pen. Code, § 1202.4, subd. (f) [setting forth similar requirements in the criminal context].)

Restitution may also be ordered as a condition of probation in a hit and run case. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) Statutes prescribing direct victim restitution are to be broadly and liberally construed. (*Luis M. v. Superior Court* (2014) 59 Cal.4th 300, 305.) "An order of direct victim restitution acts to make the victim whole, rehabilitate the minor, and deter future delinquent behavior [citations], and is reviewed for abuse of discretion [citations]." (*Ibid.*)

Here, it is not clear what damages Hawes suffered "as a result of" T.A.'s misconduct. She was declared a ward of the court because she drove without a valid driver's license and failed to stop at the scene of an accident. Hawes suffered injury because he was struck by T.A.'s vehicle, but it is not clear she was at fault, as Hawes, possibly impaired, was walking in the roadway in the dark when it occurred. Assuming he was wholly or partially at fault for the accident itself, T.A.'s lack of a driver's license did nothing to cause or exacerbate his injuries. The gravamen of a hit-and-run offense "is not the initial injury of the victim, but leaving the scene without presenting identification or rendering aid." (*People v. Escobar* (1991) 235 Cal.App.3d 1504, 1509.) Although it

is possible that a delayed medical response occasioned by T.A.'s leaving the accident scene exacerbated Hawes's injuries, nothing in the record supports such a finding.

However, restitution ordered as a condition of probation in a hit-and-run case is not limited to damages caused solely by criminal conduct underlying the conviction, i.e., leaving the scene of the accident, or to the exact amount of loss for which the defendant is actually culpable. On the contrary, restitution exceeding losses caused by the crime may be ordered where to do so will serve one of the purposes of probation. (*People v. Carbajal, supra*, 10 Cal.4th at p. 1122; see Pen. Code, § 1203.1, subd. (j) [“The court may impose [probation conditions] as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer”].) But where there has been no finding the defendant's misconduct caused *any* of the victim's damages, an order that she pay for all of them little serves the interests of justice or rehabilitation. (See *People v. Corners* (1985) 176 Cal.App.3d 139, 146-147 [absent determinations of a defendant's civil liability and the victim's possible contributory negligence in a hit-and-run case, a restitution order would have no relationship to the crime and would therefore serve no rehabilitative purpose].)

The Attorney General relies on *People v. Carbajal, supra*, 10 Cal.4th at page 1121, and *People v. Rubics* (2006) 136 Cal.App.4th 452 for the proposition that the amount of restitution ordered in a hit-and-run case as a condition of probation may exceed losses directly caused by the defendant's leaving the scene of an accident. In *People v. Carbajal*, the defendant drove his car into an unoccupied vehicle that was legally parked on the side of the road, then drove away without leaving his name or other information. He pleaded no contest to violation of Vehicle Code section 20002, which imposes a duty to stop after an accident resulting in damage to property. The Supreme Court approved restitution for property damage caused in such a hit-and-run accident, holding “it is within the trial court's discretion in such a case to condition probation on payment of restitution to the owner of the property damaged in the accident from which

the defendant unlawfully fled. A restitution condition in such a case can be reasonably related to the offense underlying the conviction and can serve the purposes of rehabilitating the offender and deterring future criminality.” (*People v. Carbajal*, *supra*, 10 Cal.4th at p. 1119.) In *People v. Rubics*, the defendant pleaded guilty to felony hit and run and was ordered to pay \$44,414 for the victim’s funeral expenses. On appeal he argued insufficient evidence established he caused the accident. The appellate court affirmed the restitution order, holding that an accident investigator’s determination that the defendant was at fault was sufficient to support the order. (136 Cal.App.4th at p. 461.)

Both cases are inapposite because in both, evidence showed the defendant’s misconduct caused the victim’s injuries. In that context, imposition of a restitution requirement could serve one of the purposes of probation—justice, redress to society, recompense to the victim, or rehabilitation of the probationer—even if the amount ordered exceeded the loss actually caused by the misconduct. But where there is no evidence the defendant’s misconduct caused the victim’s injuries, none of these goals is served by direct restitution.

“Disposing of civil liability cannot be a function of restitution in a criminal case. To begin with, the criminal justice system is essentially incapable of determining that a defendant is in fact civilly liable, and if so, to what extent. . . . A party sued civilly has important due process rights, including appropriate pleadings, discovery, and a right to a trial by jury on the specific issues of liability and damages. The judge in the criminal trial should not be permitted to emasculate those rights by simply declaring his belief that the defendant owes a sum of money.” (*People v. Richards* (1976) 17 Cal.3d 614, 620, disapproved on another ground by *People v. Carbajal*, *supra*, 10 Cal.4th at p. 1126.)

### **III. The maximum period of confinement was improper.**

T.A. contends the juvenile court erred by setting a maximum term of confinement, as she was placed on home probation. The Attorney General concedes the point, and we agree.

If a minor is removed from the physical custody of her parent as the result of an order of wardship, “the order shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court.” (Welf. & Inst. Code, § 726, subd. (d).) A juvenile court has no authority to specify a term of confinement absent removal. (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 541.) The specification of such a term must therefore be stricken.

### **DISPOSITION**

The adjudication order is modified as follows: (1) The finding on count 2, hit and run driving resulting in injury to another person, is reversed; (2) the direct restitution order is stricken; and (3) the maximum confinement term set by the court is stricken. In all other respects the adjudication order is affirmed.

NOT TO BE PUBLISHED.

CHANNEY, Acting P. J.

WE CONCUR:

JOHNSON, J.

LUI, J.